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NO. 84-55

In the Supreme Court of the United States

OCTOBER TERM, 1984

EMPLOYERS NATIONAL INSURANCE COMPANY,

Petitioner

versus

JORGE OCHOA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUGGESTION OF MOOTNESS

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PETITION FOR CERTIORARI FILED JULY 12, 1984
CERTIORARI GRANTED OCTOBER 29, 1984

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SUGGESTION OF MOOTNESS

On October 29, 1984, the Clerk wrote Petitioner that its Petition for a Writ of Certiorari was granted. Petitioner feels obliged to file this Suggestion of Mootness in view of developments subsequent to the filing of its Petition for Writ of Certiorari on July 12, 1984 which were not brought to this Court's attention in the brief filed in opposition to its petition on October 3, 1984.

On September 28, 1984, the President signed the 1984 Amendments to the Longshoremen's and Harbor Workers' Compensation Act.

Section 933 of the Act, which is the controlling section in this case, was amended as follows:

COMPENSATION FOR INJURIES WHERE THIRD PERSONS ARE LIABLE

Sec. 21.(a) Section 33 (b) is amended to read as follows:

"(b) Acceptance of compensation under an award in a compensation order filed by the deputy commissioner, an administrative law judge, or the Board shall operate as an assignment to the employer of all rights of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such acceptance. If the employer fails to commence an action against such third person within ninety days after the cause of action is assigned under this section, the right to bring such action shall revert to the person entitled to compensation. For the purpose of this subsection, the term 'award' with respect to a compensation order means a formal order issued by the deputy commissioner, an administrative law judge, or Board."

(b) Section 33(e)(2) is amended by striking out ", less one-fifth of such excess which shall belong to the employer".

(c) Section 33(f) is amended—

(1) by inserting "net" before "amount recovered"; and

(2) by adding at the end thereof the following: "Such net amount shall be equal to the actual amount recovered less the expenses

reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees).".

(d) Section 33(g) is amended to read as follows:

"(g)(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) for an amount less than the compensation to which the person (or the person's representative) would be entitled under this Act, the employer shall be liable for compensation as determined under subsection (f) only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

"(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this Act shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this Act.

"(3) Any payments by the special fund established under section 44 shall be a lien upon the proceeds of any settlement obtained from or judgment rendered against a third person referred to under subsection (a). Notwithstanding any other provision of law, such lien shall be enforceable against such proceeds, regardless of whether the Secretary

on behalf of the special fund has agreed to or has received actual notice of the settlement or judgment.

"(4) Any payments by a trust fund described in section 17 shall be a lien upon the proceeds of any settlement obtained from or judgment recorded against a third person referred to under subsection (a). Such lien shall have priority over a lien under paragraph (3) of this subsection.".

The Joint Explanatory Statement of the Committee of the Conference, as it pertains to the amendment of Section 933, reads as follows:

COMPENSATION FOR INJURIES WHERE THIRD PERSONS ARE LIABLE

Senate Bill and House Amendment

The Senate bill and the House amendment both provide for a reversion to the employee of a right to file an action against a third person. The Senate bill affords this right following a "reasonable time" after such right passes initially from the employee to the employer without the employer filing such action. The House amendment requires ruling within 90 days.

The Senate bill and the House amendment also address when the 6-month period, within which period the employee has an initial right to file an action against a third party, begins to run. The Senate bill states that this period begins running at the issuance of a formal compensation order. The House amendment states that the period begins running either on issuance of a formal order or on payment to compensation voluntarily by an employer.

The Senate bill and the House amendment both alter the priority for distribution of proceeds in a recovery by judgment or settlement where the employee brings an action against a third party. The Senate bill gives priority to the employer's lien on compensation and medical benefits paid, with the employee retaining any excess first for payment of attorney fees and costs. In a recovery by judgment only, the House amendment guarantees the employee 15 percent of any recovery remaining after reduction for attorney fees and costs, before exercise by the employer of its subrogation lien rights.

Conference Substitute

The Conference substitute provides that the 6-month period within which a person entitled to compensation can file a third party suit commences only upon the entry of a formal order awarding compensation. This is in accord with the decision in *Pallas Shipping Agency v. Duris,* 103 S. Ct. 1991 (1983). The conferees expect that an employer who does make voluntary payments will be able to obtain without delay the necessary compensation order constituting the formal award, so that the 6-month period may commence. Once the assignment occurs, the employer has 90 days within which to file suit; otherwise, the right to sue reverts back.

The Conference substitute establishes the following priority for distribution of proceeds in a recovery by an employee: First, the litigation expenses, including reasonable attorney fees, are satisfied. This may require that the court exercise its discretion to adjust the attorney fee to assure equity for both the employee and his attorney. The compensation lien on the net recovery remains inviolable, consistent with *Bloomer v. Liberty Mutual Insurance, Co.,* 445 U.S. 74 (1980).

ARGUMENT

Petitioner urges that the 1984 amendment of Section 933 does not render the present case moot insofar as its national significance is concerned. While the Committee Report clearly adopts the formula of the Fifth Circuit in the case below for the distribution of the proceeds of a third party judgment secured by the longshoreman, that intention is simply not expressed in the amendment. It is the amendment, not the Committee report, which necessarily governs the rights of past and future litigants.

The Court will note that Section 933(e), which the Court deemed significant in *Bloomer v. Liberty Mutual Ins. Co.*, 100 S.Ct. 925, 928 (1980), is unchanged except for "the striking of the one-fifth of such excess shall belong to the employer", 933(e)(2).

Section 933(f) is also amended to provide, in essence, that the credit to the Employer for further compensation owed to the longshoreman shall be computed on the net rather than the gross recovery against the third party, i.e. after the payment of expenses and reasonable attorney's fees. This amendment, Petitioner submits, merely adopts the prior rulings of the lower courts and applies to the credit against future compensation owed by the compensation carrier to the longshoreman, not the allocation of the proceeds of a judgment between the longshoreman, his attorney and the compensation carrier.

This contradiction between the intent of Congress, as expressed in the Committee Report, and the amendment, as enacted, further clouds rather than clarifies the law insofar as future litigants and Courts are concerned and this Court, Petitioner submits, is the only Court which can

decide whether Congress has or has not enacted what its Committee Report says it intended to enact.

For the foregoing reasons, Petitioner submits that the present case is not moot and that the uncertainty which prompted this Court to grant the present writ is further compounded by the contradiction between the 1984 amendment and the Committee Report.

Pending the Court's action on this suggestion of mootness, Petitioner requests that the time for filing of the joint appendix and Petitioner's brief be suspended.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that three copies of the above Suggestion of Mootness were served upon counsel for the respondent, first class postage prepaid, addressed to his office in New Orleans, Louisiana, this 9th day of November, 1984.

THOMAS W. THORNE, JR.
Counsel for Petitioner